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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-719

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL-CIO, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Petitioner's statement of the question presented is incorrect.

The question presented is, as stated in the opinion of the Court of Appeals:

"Whether an employer can abrogate unilaterlly and breach a validly executed collective bargaining prehire agreement merely because the agreement was a prehire agreement in the construction industry validly entered into pursuant to Section 8(f) of the National Labor Relations Act." (Pet. App. 2a).

STATEMENT

Petitioner's Statement glosses over or omits many important facts of record, which are undisputed.

The union and the employer, hereinafter called Higdon, have had a collective bargaining relationship and have entered into labor agreements for at least eight years, since 1965. (App. 19, 23).[1]

The employer, which had used the name Higdon Construction Company, formed a new corporation, known as Higdon Contracting Company, solely "in order to get around the contract" which it had entered into with the union. (App. 33).

The employer then violated and breached the contract. The union then commenced picketing the employer for the sole purpose of attempting to secure compliance with the contract and its picket sign at all times carried the following inscription:

> "Higdon Construction Company is in violation of the agreement of the Iron Workers Local Number 103." (Pet. App. 9a, 17a).

The union then filed an unfair labor practice charge against Higdon, charging that it had violated Sections 8(a)(1), (3), and (5) of the Act, but the Board summarily dismissed same, for the reason that "the only purpose of the picketing was to require the employer to honor its contract with Bridge, Structural and Ornanmental Iron Workers, Local 103." (Pet. App. 9a, 17a; App. 43).

Upon a charge filed by Higdon, that the union had violated Section 8(b)(7)(C) of the Act by picketing for more than thirty

[1] ("App." refers to the Appendix to NLRB's Brief.)

days without filing a petition for an election, a complaint was issued against the union, and the Board applied for an injunction to enjoin the picketing complained of. The District Court refused to grant the Board an injunction, condemning the unconscionable attempt by the employer to evade its contractual obligation as "corporate gymnastics". (App. 38).

The Administrative Law Judge recommended that the complaint be dismissed, pointing out that Section 8(b)(7)(C) did not apply because it was intended to proscribe picketing having as its object, forcing an employer's initial acceptance of the union as the bargaining representative of its employees, and not picketing such as in the case at bar which was for the sole object of requiring an employer to live up to and comply with a valid collective bargaining agreement. The Administrative Law Judge also sharply condemned the tactics of the employer in this case as "chicanery", "a subterfuge and a sham. This blow hot, blow cold stance of the employer . . ." (Pet. App. 33a-36a).

The Board reversed the decision of its Administrative Law Judge, because it chose to follow its decision in *R. J. Smith Construction Company, Inc.*, 191 NLRB 693, where it held "that a pre-hire agreement, although validly executed for a fixed term of years, is effective only so long as both parties wish to adhere to it and may be ignored with impunity . . . by either party at any time . . ." (Pet. App. 32a, 20a; App. 12). This has been the Board's position throughout this litigation, from the time of the opening statement of its General Counsel. (App. 12).

The Board's decision was reversed by the Court of Appeals in a decision written by Judge Danaher, which held, following an earlier decision of the same Court and a decision of the Court of Appeals for the Third Circuit, that pre-hire agreements validly entered into under Section 8(f) of the Act cannot be abrogated by either party at will. The Board petition for rehearing *en banc* was denied. (Pet. App. 1a-13a).

SUMMARY OF ARGUMENT

1. Petitioner's position is that an employer can unilaterally abrogate a validly executed pre-hire agreement, and can commit unfair labor practices, merely because the union has not established that it had a majority status. There is nothing in the language, history, or policy of Section 8(f) to justify or even permit this construction, and the two Courts of Appeals which have ruled on the question, have both ruled squarely against the petitioner.

2. Basic to the framework of the National Labor Relations Act, and the effectuation of its purposes to achieve stability in labor relations, is good faith bargaining between an employer and a union, leading to a collective bargaining agreement which is binding on both sides. But the Board's decision which Petitioner seeks to enforce would do the opposite—by encouraging parties to abrogate validly executed agreements, it would undermine good faith bargaining, stability in labor relations and the sanctity of contractual obligations.

3. Petitioner's entire case is based on its misstatement that when respondent union engaged in picketing to protest the employer's breach of its lawful agreement, the union was engaged in "recognitional picketing".

The record is undisputed, the Administrative Law Judge, the Board itself and the Court of Appeals all found that, as the Court below stated, "The union here . . . had been picketing to secure compliance with an existing contract valid under Section 8(f), . . ." (Pet. App. 9a, ft. 4). The Board itself has repeatedly ruled that it is only *initial* picketing to secure *initial* recognition of the union which is "recognitional" picketing which falls within the ambit of Section 8(b)(7)(C). This was not the case here, for the union and the employer have had a

contractual bargaining relationship and have entered into labor agreements for at least eight years, since 1965. (App. 19, 23).

4. Petitioner's interpretation would create two kinds of collective bargaining agreements—those which are valid for their term, and another kind which can be unilaterally abrogated by the parties at will. Not only is such an interpretation directly contrary to the wording of the Act, but it would create substantial industrial unrest, directly contrary to the purposes of the Act. Section 8(f) provides ample safeguards to protect workers from pre-hire agreements which are not to their desire or best interests—elections which can be petitioned for by the employees, or the employer, at any time. Such safeguards are ample, they were present at the case at bar, but the employer and its employees chose not to use them.

5. This case illustrates some of the undesirable effects of the Board's misreading the Act—it has encouraged flagrant unfair labor practices, as the Court of Appeals had warned, by an employer who was guilty of subterfuge and chicanery. The Board's decision, which was properly reversed by the Court of Appeals, sought to legitimize an illegal "blow hot, blow cold stance" which permits an employer to adhere to a contract for only those purposes which suit it. Such a practice would undermine the very bedrock of good faith collective bargaining and the purposes of the Act, and allow the parties to destroy the binding effect of and nullify valid labor contracts.

ARGUMENT

An Employer Cannot Unilaterally Abrogate and Breach a Collective Bargaining Agreement Merely Because the Agreement Is a Pre-Hire Agreement in the Construction Industry Validly Entered Into Pursuant to Section 8(f) of the National Labor Relations Act.

A. **The Board's position in this case contravenes the wording and the purpose of Section 8(f) by making pre-hire agreements virtually unenforceable.**

As the Court of Appeals correctly ruled, the Board's position contravenes the wording as well as the purpose of Section 8(f) by making pre-hire agreements virtually unenforceable.

Petitioner states: "Where a union with a pre-hire agreement does not in fact represent a majority of the employees, the employer is not required to comply with the agreement . . ." (Brief 27). Thus, any time an employer wants to repudiate a valid 8(f) agreement, all it has to do is to contend the union does not in fact represent a majority of its employees.

This contention of petitioner is absurd, as Judges McGowan, Winter and MacKinnon, pointed out four years ago in their decision in *Local 150, Operating Engineers v. NLRB*, 156 U.S. App. D.C. 294, 480 F. 2d 1186, 1190 (1973):

> ". . . we cannot conceive of such an exercise in futility on the part of Congress as to validate a contract with a union having minority status, but to permit its abrogation because of the union's minority status. The Board's interpretation . . . would frustrate Congress' purpose of approving pre-hire agreements in the construction industry, for it would render them voidable at will." 480 F. 2d at p. 1190.

Petitioner's contention that this fact has to be determined by being "litigated in an unfair labor practice proceeding" is also absurd. (Brief 27).

First of all, Section 8(f) provides specific safeguards for an employer and its employees who do not wish to be bound by an 8(f) contract, or be represented by the union which executed same, by providing that the employer or the employees can petition for an election *at any time*.

Second, the Act itself makes no such requirement that an 8(f) pre-hire agreement is valid only where the union's majority status has been litigated in an unfair labor practice proceeding.

Third, the Act does not establish two kinds of labor agreements—those which are binding, and those which are binding only if the union shows it has a majority in an unfair labor practice proceeding. Reading such language into the Act is not an interpretation or even amendment of it—it is an evisceration of the very guts of collective bargaining—the good faith expectation that each side will make every effort to live up to the agreement that it enters into.

If Congress had wanted to provide that an 8(f) agreement is binding only if the union subsequently demonstrates its majority status, it would have said so in the Act. There is absolutely nothing in the legislative history or the language or policy of Section 8(f) to justify such contention.

Petitioner's concern for "top down" organizing practices is misplaced. Section 8(f) gives ample and full protection against this, as the Court of Appeals found, by its provision that even though an 8(f) contract is entered into, the employees or the employer can petition for an election *at any time*.

Therefore, *Connell Construction Company, Inc v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, is not applicable to the

case at bar and offers petitioner no support. *Connell* did not involve an 8(f) agreement, nor does the case at bar involve Section 8(b)(7)(C). Further, this Court recognized in *Connell* that there is special consideration given construction unions by virtue of Section 8(f), "which allows 'pre-hire' agreements in the construction industry, but only under careful safeguards preserving workers' rights to decline union representation." (421 U.S. at 632). These safeguards were present in the case at bar, but the employer and its employees chose not to use them.

Petitioner would now seek to have this Court rewrite the Act by providing that an 8(f) contract can be voided by an employer, at will, even though the employer and employees failed to exercise any of the safeguards provided therein preserving the workers' right to decline union representation. Such an amendment is proper only for the legislature; but more important, it would frustrate the very purpose of Congress in enacting Section 8(f) in that it would permit an employer to tear up an 8(f) agreement as soon as it entered into one. Section 8(f) does not provide for nor even envisage so absurd and futile a result.

This is exactly what the Court of Appeals for the District of Columbia properly ruled in the decision below, and in following its precedent in *Local No. 150*, four years ago, when it held:

> ". . . we can find no sanction in the language, history or policy of Section 8(f) for permitting an employer to abrogate unilaterally a validity executed prehire agreement or for permitting the employer to commit what is otherwise an unfair labor practice even though at the time of either the union has not achieved majority status." *Local No. 150, International Union of Operating Engineers AFL-CIO v. N.L.R.B.*, 156 U.S. App. D.C. 294, 480 F. 2d 1186, 1190 (1973).

Petitioner's attempt to distinguish *NLRB v. Irvin-McKelvy*, 475 F. 2d 1265, 1271 (C.A. 3, 1973), on the ground that that

contract contained a union security clause, is without substance. If the Board's position were upheld, that a Section 8(f) agreement is binding only if it contains a union security clause, this would not be an interpretation, but an amendment of the Act.

Further, the Court of Appeals in *Irvin-McKelvy* squarely held that:

> "Nothing in neither the text nor the legislative history of Section 8(f) suggests that it was intended to leave construction industry employers free to repudiate contracts at will." *NLRB v. Irvin-McKelvy*, 475 F. 2d 1265, 1271 (C.A. 3, 1973).

Yet, this is the essence of the Board's decision in the case at bar.

B. **Respondent union's picketing in this case was for the purpose of securing compliance with a valid collective bargaining agreement. The law is clear that such picketing is not recognitional picketing, particularly where the union and the employer had been engaged in collective bargaining and had entered into labor agreements for nine years. Therefore Section 8(b)(7)(C) does not apply.**

Petitioner's case is based upon its misstating the issue by contending that the picketing of the union, admittedly to protest the employer's breach of an admittedly valid collective bargaining agreement, was "recognitional picketing".

Not only does this fly in the face of the Record, the findings of the Administrative Law Judge, of the Board itself and of the Court of Appeals, that "The union here . . . had been picketing to secure compliance with an existing contract valid under Section 8(f). . . .", but this flies in the face of well estab-

lished law. The law is clear that, as the courts and the Board have all ruled, picketing by a union to secure compliance with an existing contract is not barred by Section 8(b)(7)(C). *Bay Counties District Council of Carpenters, etc.* (1965), 154 NLRB 1598, enf. 382 F. 2d 593 (C.A. 9, 1967); *Building and Construction Trades Council of Santa Barbara County* (Sullivan Electric Company), 146 NLRB 1086.

Petitioner even admits this in its brief when it states, "Thus, where an employer has voluntarily recognized such a union and has entered into a labor agreement with it, the Board has held that picketing to enforce that agreement, or succeeding agreements, does not violate Section 8(b)(7) although the picketing in fact constitutes an attempt by the union to force the employer to bargain with it." (Brief 17). This is what happened in the case at bar—Higdon "voluntarily recognized (respondent) union and has entered into a labor agreement with it." Yet the Board contends the union's picketing in this case is in violation of Section 8(b)(7)(C) solely because of its erroneous ruling that Section 8(f) contracts may be unilaterally abrogated by an employer.

As the Board itself pointed out in the *Bay Counties* case, recognitional picketing occurs only where the union attempts to gain *"initial"* recognition. It is contrary to fact to say that the respondent union in this case engaged in recognitional picketing, when the record is uncontroverted that it had been engaged in collective bargaining with the employer for eight years, and had entered into labor agreements with the employer during that time. (App. 19, 23).

Petitioner attempts to distinguish these cases on the basis that this rule applies only where the employer recognized "an uncertified union representing a majority of the employees". (Brief 16-17). However, nowhere in the language of those cases does such a distinction appear—and the very language

of the Board itself, shows that the concept of "recognitional picketing" applies only where the union seeks to obtain *"initial"* recognition. Thus, as the Court of Appeals for the Columbia Circuit pointed out in *Dallas Building and Construction Trades Council v. NLRB* (D.C. Cir. 1968), 396 F. 2d 677, at 683: ". . . The Board correctly points out that Section 8(b)(7)(A) is aimed only at a labor organization's picketing to gain recognition for the first time, not picketing designed to retain its representative status."

C. **The Board's concern for unwilling employees is misplaced. The statutory safeguards provided by Section 8(f) for an employer and its employees to decline union representation were fully available, but were not used by the employer or its employees in the case at bar.**

The record is silent and states absolutely no reason to explain why, if the employees were unwilling to be represented by respondent union and did not want to accept the benefits of the collective bargaining agreement, they failed to file a petition for an election, which is one of the safeguards provided them under Section 8(f). It certainly is not unreasonable to infer that they were satisfied with being represented by the union and having the benefits of the collective bargaining agreement herein. But in any event, this affords no justification for the Board to amend Section 8(f) to insert a requirement that an 8(f) contract is valid only if the union achieves majority status, where the Act does not so state and ample safeguards for workers' rights to decline union representation are available and were not exercised.

Therefore, the two decisions of this Court principally relied upon by petitioner afford petitioner no support. As we pointed out above, *Connell Construction Company, Inc. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616, did not involve an 8(f) agreement, and this Court recognized in *Connell* that Sec-

tion 8(f) agreements are valid because of the safeguards preserving workers' rights to decline union representation, which were not exercised in the case at bar.

Petitioner then attempts to rely on *Linden Lumber Division v. National Labor Relations Board*, 419 U.S. 301, and incorrectly cites it for the proposition that "the Act places the burden on the union to establish its majority". (Brief 32). This is a clear distortion of *Linden*, because *Linden* did *not* involve a Section 8(f) agreement and this quotation does not apply to an 8(f) pre-hire agreement. Petitioner ignores the fact that if an employer does not want to continue to comply with a collective bargaining agreement he entered into, Section 8(f) of the Act does place the burden on him, or on his dissatisfied employees, to file a petition for an election. Therefore, *Linden* offers petitioner no support. This Court did not, in *Linden*, sanction an employer's flagrant violation of a contract it voluntarily entered into, after eight years of a collective bargaining relationship with the union as was done in the case at bar, where the employer and its employees had the reasonable alternative of petitioning for an election if they believed that the union did not represent the majority of the employees.

Petitioner is in error when it states that "here, as in *Linden Lumber*, there was no evidence of unfair practices by the employer". (Brief 34). On the contrary, in its brief in the Court of Appeals, petitioner admitted that the Company had committed a "putative unfair labor practice" (page 17). There is strong evidence of unfair labor practices on the part of the employer here—the Record is uncontroverted as to the employer's "subterfuge and chicanery" and its forming of a dummy corporation in order to undermine the union's area wage standards, which the employer had agreed to, and to "get around the contract" it had solemnly entered into.

These unfair labor practices in this case were so flagrant as to bring down the strong disapproval of both the District Judge

who denied the Board's petition for an injunction, and the Administrative Law Judge who condemned them as "subterfuge and chicanery".

Perhaps more shocking is the petitioner's position that not only can an employer repudiate its contract if it says the union does not represent a majority, but that it is free to commit unfair labor practices because of the same.

As the Court of Appeals pointed out in squarely demolishing this contention, in *Local No. 150, supra*:

> "We agree that section 8(f) does not wholly obviate the union's need ultimately to achieve majority status, but we disagree with the Board's conclusion that the employer can commit unfair labor practices before the union become a majority. To state the history and purpose of section 8(f) is both to reject the contention and to decide the case, because *we cannot conceive of such an exercise in futility on the part of Congress as to validate a contract with a union having minority status, but to permit its abrogation because of the union's minority status.* The Board's interpretation . . . would frustrate Congress' purpose of approving pre-hire agreements in the construction industry, for it would render them voidable at will. If the union, or the employer, can neither bring nor maintain unfair labor practice complaints, pre-hire agreements would be virtually unenforceable. We are certain that this was not the purpose of Congress.
>
> "Moreover, under the Board's interpretation, an employer, unhappy with a pre-hire agreement, can avoid it by discouraging union membership through flagrant unfair labor practices, thereby insuring that the union never attains a majority. This case illustrates that danger." 480 F. at p. 1190. (Our emphasis).

Petitioner misstates the position of the Court of Appeals when it states that "Under the Court's view an employer would be bound by a pre-hire agreement not only in cases where his employees desire no union but also even in cases where most of his employees are members of another union". (Brief 29-30).

In the first place, if most of an employer's employees are members of another union, he would not sign a pre-hire agreement with a different union, because, as petitioner itself recognizes, one of the principal purposes of a Section 8(f) agreement is for an employer "to have available a supply of skilled craftsmen ready for quick referral". (Brief 21). If an employer already has a supply of skilled craftsmen available who are members of another union, he would not need to sign a pre hire agreement with a different union.

Further, as the Court of Appeals emphasized in its decision, if an employer's employees desire no union, or belong to another union, the employees or the employer can petition for an election *at any time*, as Section 8(f) provides. Under the expedited election proceedings of the Board, the matter then would be determined in a couple of weeks, rather than in years as would be the case under the Board's position that an 8(f) agreement can only be validated in a subsequent unfair labor practice proceeding.

Further, the procedure set out in the Act and recited by the Court below, is one which follows the law, rather than disregards it, and would not encourage parties to unilaterally abrogate collective bargaining agreements, which is the effect of the Board's position herein.

Similarly, the false alarm petitioner conjures up, that the Court of Appeals' position poses a danger that unions will be able to coerce employees' support through such tactics as protracted picketing, deliberately disregards the wording of the Act and misstates the position of the Court of Appeals.

If an employer believes that union picketing is coercive, he can petition for an election the very day that the picketing starts. Under the Board's procedure for expedited election, the matter can be determined in less than the thirty days that the petitioner would allow a union to picket, under its attempt to redraft Section 8(f).

The weakness of the petitioner's contentions herein is shown by the fact that petitioner not only seeks to rewrite the Act, but finds it necessary to rewrite its own decision in its brief in this Court in order to defend it. Thus, in this Court, the Board contends that under the Board's decision an 8(f) agreement is valid in some circumstances, although it can be unilaterally abrogated by an employer, but the Board's decision itself holds "that Section 8(f) only protects from illegality *the preliminary contractual steps* of a pre-hire agreement . . ." (Pet. App. 18a) (Our emphasis).

The Board misstates the law when it states that its "decisions under Section 8(f) reveal a consistent rationale" and then uses such consistency as an argument in favor of the courts abandoning their role in interpreting the statute in favor of the Board's "familiarity with the statute". (Brief 25, 34).

The fact is, that as Judge Winter pointed out in his opinion in *Local No. 150, supra*, reversing the Board, a prior decision of the Board is directly contrary to its decision in the case at bar and in *R. J. Smith Company, supra*:

> "Finally, prior Board precedent supports our interpretation of § 8(f). Oilfield Maintenance Co., Inc., 142 N.L.R.B. 1384 (1963), held that an employer was bound to a pre-hire agreement and that therefore its failure to observe its provisions constituted an unfair labor practice. The opinion explained: 'Although . . . the majority status of the (union) prior to the commission of the unfair labor

practices has not been demonstrated . . ., the (union's) . . . contract would still be valid under Section 8(f).' *Id.* at 1387. The opinion 'specifically note(d) in this regard the final proviso to Section 8(f) . . .' *Id.* at 1387 n. 10. We hold therefore that an employer, who has entered into a validly executed § 8(f) pre-hire agreement may, after a reasonable period, seek a representation election to challenge an enduring minority union, but until he does and prevails, he should be held to the same standard of conduct in regard to unfair labor practices as an employer who has entered into a collective bargaining agreement with a union certified to have majority status." (480 F. 2d 1190-1191).

It is uncontroverted that the Act is designed to encourage good faith bargaining and promote industrial peace. These objectives would be destroyed by the Board's position that an employer, which engaged in conduct characterized by a District Judge as "corporate gymnastics" and by an Administrative Law Judge as "subterfuge and chicanery", should be immunized from its unfair labor practices and can with impunity repudiate a valid 8(f) labor agreement entered into with a union with whom it had engaged in collective bargaining for eight years.

CONCLUSION

The judgment of the Court of Appeals should be affirmed on Judge Danaher's excellent opinion, which follows unanimous decisions of the U.S. Court of Appeal for the Third and District of Columbia Circuits.

Respectfully submitted,

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